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Supreme Court, U.S.
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In the

Supreme Court of the United States

J.D. FIELDS & COMPANY, INC.,

Petitioner,

v.

NICOLE DUFRESNE.

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a Sexual Harassment/Hostile Work Environment Claim, Where the Plaintiff Alleges that She Never Received the Employee Manual which Contained the Employer's Harassment Policy, Does the Employer Still Satisfy the First Prong of the *Faragher/Ellerth* Affirmative Defense When the Plaintiff Testifies that She Knew the Employer Would Not Tolerate Sexual Harassment?

2. In a Sexual Harassment/Hostile Work Environment Claim, Should the Employer Be Limited Strictly to the Affirmative Defense Established by this Court in *Faragher* and *Ellerth* Where the Plaintiff Admits that She Would Not Have Reported the Harassment Because She Did Not Want to Jeopardize the *Harasser*'s Job?

3. Does Constructive Discharge Constitute the "Tangible Employment Action" Necessary to Impose Strict Liability on the Employer as Required by this Court in *Faragher/Ellerth*?

4. Can a Supervisor's Non-Sexual Bad Behavior Create a Hostile Work Environment If It Is Directed to Everyone in the Office Regardless of their Gender?

5. Does a Warning About Possible Layoffs Constitute an "Adverse Employment Action" Sufficient to Sustain a Retaliation Claim When the Employee Is Not Actually Laid Off?

PARTIES TO THE PROCEEDING

The parties to this action are:

1. Nicole Dufresne, Respondent/Plaintiff

2. J. D. Fields & Company, Inc., Petitioner/Defendant

J. D. Fields & Company, Inc. is a Louisiana corporation. It is a closely-held corporation whose stock is not publicly traded. It has no parent corporation, nor does it own any subsidiaries. None of its shareholders is a publicly-held corporation.

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STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari arises from a judgment rendered by the United States Court of Appeals for the Fifth Circuit on April 15, 2003, substantially affirming a jury verdict and corresponding judgments rendered by the United States District Court for the Eastern District of Louisiana. Petitioner moved for rehearing on April 29, 2003 which the Fifth Circuit Court denied on May 13, 2003.

CITATION OF OPINIONS BELOW

The opinions rendered below are not reported. The decision of the United States Fifth Circuit Court of Appeals is merely referenced in a "Table of Decisions Without Reported Opinion," appearing in the Federal Reporter at 66 Fed. Appx. 525 (Table), 2003 WL 21017386 (2003).

STATUTES INVOLVED

42 U.S.C. § 2000e-2(a)(1), which provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer–
>
> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

and

42 U.S.C. § 2000e-3(a), which provides:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment

> agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

On December 10, 1999, the respondent, Nicole Dufresne ("Dufresne"), instituted this proceeding against the petitioner, J. D. Fields & Company, Inc. ("Fields"), in the United States District Court for the Eastern District of Louisiana, alleging sexual harassment violations under Title VII of the 1964 Civil Rights Act, codified at 42 U.S.C. § 2000e-2(a)(1), by one of her supervisors, Tom deMahy ("deMahy").

Dufresne was employed as a secretary at the Louisiana satellite office of J. D. Fields & Company, Inc. ("Fields")[1] from 1993, until she resigned on July 5, 1999.

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[1]Fields' home office is located in Houston, Texas, where the majority of its administrative employees are located. However, Fields has satellite offices in Chicago, Pennsylvania, New Orleans, Dallas, Tulsa, and Denver. Most of those satellite offices contain only one or two sales personnel. Fields' Louisiana satellite office was one of the few that had a strictly clerical employee.

At the time of Dufresne's initial employment, Fields' Louisiana office staff consisted only of Dufresne and two of Fields' vice-presidents, Tom deMahy ("deMahy") and Mike Strange ("Strange"). deMahy and Strange were of equivalent line authority within Fields' management. Later, Brian McHale ("McHale") joined the company as a salesman at Fields' Louisiana office. Although Dufresne handled typing and clerical duties for McHale, as well as deMahy and Strange, only the latter were Dufresne's supervisors. McHale not only had no managerial authority within Fields' corporate structure, but also had no authority over employment decisions related to Dufresne or the other members of the Louisiana office. McHale's supervisors were also deMahy and Strange.

The genesis of Dufresne's complaint began on January 7, 1997 (almost 2-½ years before her exodus from Fields' employ), the date she alleged deMahy took her to dinner at a Chinese restaurant and propositioned her.[2] According to Dufresne, after she rejected this proposition, she experienced a hostile work environment consisting of deMahy's being critical of her work and routinely yelling and screaming at her. Although Dufresne acknowledged that her work performance was ofttimes deficient, she contended that deMahy's criticism began only after she rejected the proposition. However, deMahy never directly propositioned her again, and he never threatened her with any adverse employment action for her refusal of his advances.

In addition to the "yelling and screaming," Dufresne did also complain that on a few occasions over

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[2]deMahy denied that any such dinner date occurred, and Dufresne offered no evidence to corroborate her testimony.

the same 2- ½ year period, deMahy made a few statements[3] and adopted body language[4] that she perceived as sexually inappropriate.[5] Notwithstanding the cramped quarters in Fields' Louisiana office, neither Strange nor McHale ever heard any of these comments, and neither of them ever witnessed any sexually inappropriate behavior by deMahy.

Nevertheless, and notwithstanding the allegedly relentless "yelling and screaming" Dufresne contended she endured for more than two years, she never complained to anyone, other than once to deMahy himself, until an incident which occurred in early February, 1999. And, when she did speak up, she did

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[3]Dufresne complained of three statements: "Older men are better in bed"; "Your perfume makes me horny"; and, while the pair were exchanging Christmas gifts, "If you give me more, I will give you more than what is in this box as a gift."

[4]The supposedly offensive body language consisted of deMahy's pants touching her shirt during times when he dictated to her while she was seated at her computer. She also complained that when she was seated and he was dictating to her, his pelvic area was at her eye-level. However, Dufresne also admitted that the area around her desk was very cramped, and she acknowledged that when she would scoot her chair over a bit, deMahy maintained the distance she created and did *not* move closer.

[5]In putting deMahy's alleged statements into perspective, it should be noted that the atmosphere in the office was somewhat spiced with sexual innuendo, which Dufresne herself primarily created, or at least to which she contributed substantially. Dufresne admitted that she viewed, downloaded and disseminated sexually-explicit materials from the Internet, and that she contributed to off-color language and off-color jokes in the office. She discussed her PMS and menstrual problems openly with her three male co-workers. In fact, as a Christmas gift to Strange from Brian McHale and herself, Dufresne selected and purchased a sexually suggestive "piglet."

not speak directly to Strange or anyone in management at Fields' home office, but to Stephanie Gammon, Dufresne's friend, who, at that time, was also Strange's fiancée. While Dufresne and Gammon were on a personal errand for Strange outside of the office, and after a heated argument between deMahy and Gammon over Strange's new company car, Dufresne and Gammon exchanged complaints about deMahy's generally obstreperous behavior, which both women acknowledged he exhibited towards *everyone*, including Gammon, McHale, Strange and, at times, even Fields' customers.

It was only after Gammon related this conversation to Strange that Strange became aware that Dufresne was upset. However, and although Dufresne related the Chinese dinner proposition episode to Gammon as an afterthought behind her laundry list of complaints, Dufresne did not correlate the rejected proposition to the "yelling and screaming."[6] Even when Strange discussed Dufresne's complaints directly with her, Dufresne again did not correlate the two. In order to insulate Dufresne from any more "yelling and screaming" by deMahy as a result his dissatisfaction with her work product, Strange thereafter suggested

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[6]Gammon testified:

> [Dufresne] and I just started venting about Tom. And from the time we left the parking lot . . ., she and I were just complaining non-stop about Tom. And we talked about the stress level in the office due to Tom. We talked about – we just were complaining about him. . . . When we parked . . . at the dealership, [Dufresne] said, "Now this is something I haven't even told Mike," and she began telling me that Tom took her to dinner and propositioned her.

that deMahy come directly to Strange when he needed any work corrected, or had any other problems with Dufresne's job performance.

During the entire period of her employment, both before and *after* the spurned proposition at the Chinese restaurant, and up until the day she left for lunch and never returned, Dufresne received regular salary increases and generous bonuses. On one occasion, Fields even donated an automobile to her for her personal use. The decision to grant the bonuses, and to donate the automobile, was made by, and was at the personal expense of, deMahy and Strange.[7]

Via the Internet in early 1999, Dufresne established a romantic relationship with a young Louisiana marine who was stationed in California, and in June of 1999, she took her vacation in order to meet him there. When Dufresne returned, Strange advised Dufresne that there might be company-wide layoffs due to poor sales in 1999, and that she might want to put her resume out in order to be prepared.

Dufresne sought out her co-worker, McHale, who not only confirmed that he had also been given the heads-up by Strange, but also showed Dufresne the dismal sales figures. Despite her never having complained to anyone about sexually inappropriate behavior by deMahy, and further despite her never having told anyone (including Gammon) that she believed a connection existed between deMahy's "yelling and screaming" and the rebuffed proposition,

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[7]Fields did not have a policy of directly paying employees like Dufresne and McHale bonuses. Instead, Fields left it to the discretion of Strange and deMahy to share a portion of their own bonuses with Dufresne and McHale.

Dufresne concluded that Strange's warnings about possible layoffs was directed *only* to her in retaliation for her complaints about deMahy's l d disposition.

On Thursday, July 1, 1999, almost immediately after she returned from her vacation, Dufresne verbally tendered her two-week's notice to Strange. She also sent a formal resignation letter to Jerry Fields, the President and CEO of the company, with a copy to Craig Strawbridge, Fields' Vice-President of Finance, in which she cited deMahy's alleged sexual advances and behavior as the cause. Immediately upon receipt of the letter, Strawbridge urged Dufresne not to resign, and assured her there would be no repercussions as a result of her complaint. In fact, Dufresne admitted in the back-pay prong of the district court trial that Strawbridge offered her a paid leave of absence until her complaints about deMahy were resolved.

Nevertheless, on Monday, July 5, 1999, Dufresne left work for lunch and never returned to the office again. Strawbridge attempted to contact Dufresne on several occasions thereafter, but his phone calls went unanswered. A week after her abrupt departure, Dufresne traveled once again to California to "get away" and allegedly look for another job. She returned to Louisiana soon afterwards.

Prior to Dufresne, no one in Fields' employ throughout the country had ever complained of Title VII violations, including sexual harassment. In 1995, Fields promulgated an equal opportunity and harassment policy, including a complaint procedure, in its employee handbook, and the new handbook was distributed to all of Fields' offices at that time. In addition to stating that harassment "will not be tolerated," the handbook directed that any complaints of harassment in the

workplace should be directed to the Vice-President of Finance in the Houston office, the position that Strawbridge held at that time.

While Dufresne denied that she had ever seen the new employee handbook, she *admitted* that she believed Fields would not tolerate sexual harassment in the workplace. Dufresne also admitted that, even though she knew Fields would not tolerate deMahy's alleged behavior, she did not report the behavior because she **"didn't want to do anything to jeopardize [deMahy's] job. . . ."**

On January 16 and 17, 2001, Dufresne's complaint was tried before a jury as to the issues of fault and non-pecuniary damages. The jury rendered a verdict in Dufresne's favor. The jury found that a hostile work environment existed, and determined that Dufresne was constructively discharged in retaliation for complaining. The jury awarded Dufresne general damages totaling $62,500.00.

Even though the district court found it to be a close question, the court denied Fields' motion for verdict as a matter of law, and denied Fields' motions for new trial or for new trial conditioned upon remittitur. The district court thereafter held a bench trial on the issue of back-pay, and awarded Dufresne $20,300.00 in back-pay, together with attorneys fees of $36,142.50.

Fields timely appealed to the Fifth Circuit Court of Appeals, which affirmed on most issues,[8] without a

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[8]The Fifth Circuit did reduce the general damages to $50,000 to comply with the statutory cap provided by 42 U.S.C. § 1981a(b)(3)(A).

written opinion, on April 15, 2003. Fields thereafter moved for a panel rehearing, which was denied by the appellate court on May 13, 2003.

Jurisdiction of the district court was based upon federal question jurisdiction, 28 U.S.C. § 1331, and jurisdiction of the Fifth Circuit Court of Appeals arose under 28 U.S.C. § 1291.

ARGUMENT

I. A STRICT ADHERENCE TO THE AFFIRMATIVE DEFENSE PROVIDED TO EMPLOYERS BY THE COURT IN *FARAGHER/ELLERTH* LEAVES A HUGE LOOPHOLE WHICH EFFECTIVELY RELIEVES EMPLOYEES OF TAKING REASONABLE ACTION TO PROTECT THEMSELVES.

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed.2d 662 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.d.2d 633 (1998), this Court addressed the vicarious liability of an employer for sexual harassment of an employee by her supervisor. With respect to a supervisor's action which results in tangible employment action, the Court held that the employer was vicariously liable as a matter of law. Otherwise, where no tangible employment action is taken, the Court established a two-prong affirmative defense for the employer. In order to shield itself from vicarious liability, the employer must establish: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive

or corrective opportunities provided by the employer or to otherwise avoid harm. *Faragher*, 524 U.S. at 807, 118 S. Ct. 2293.

The Court also pointed out in *Faragher* that, with respect to the first prong of the defense, it is not necessary, as a matter of law, that an employer promulgate an antiharassment policy with a complaint procedure. In the case where an employer had not established such a policy and complaint mechanism, the need for a stated policy suitable to the particular employment circumstances could be addressed in proving the first prong of the defense. *Id.* Furthermore, the Court also reasoned that an employee's failure to use a complaint procedure provided by the employer will normally satisfy the second prong of the defense. *Id.*, 524 U.S. at 807-08, 118 St. C. at 2293.

The evidence was undisputed that, prior to Dufresne, no one at Fields had never experienced sexual harassment, or other Title VII violations. Nevertheless, Fields did promulgate a sexual harassment policy and complaint procedure in its revised employee manual in 1995. However, Dufresne denied that the employee manual had ever been given to her or that she had otherwise seen it.[9] Under Fields' policy, employees were directed, "Should an act of sexual harassment occur in the workplace a complaint should be filed with the Vice President – Finance[10] corporate office Houston,

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[9]It should be noted that Dufresne was the only clerical person in Fields' Louisiana satellite office, who was responsible for handling income mail and filing.

[10]At all pertinent times, Craig Strawbridge, the Vice-President to whom Dufresne sent a copy of her letter of resignation dated July 1, 1999, held this position.

Texas. . . ." Fields' procedure totally bypassed the hierarchy in any particular satellite office for sexual harassment complaints.

Employees were also assured that they could "raise concerns and make reports without fear or reprisal," and that "an investigation will be conducted in a timely and confidential manner. . . ." Finally, the employee manual warned, "Anyone engaging in sexual or other unlawful harassment will be subject to disciplinary action, up to and including *termination of employment.*" (Emphasis added.) Notwithstanding the stated policy and complaint procedure, the jury, apparently believing Dufresne's testimony that she did not receive the employee manual, found that Fields did not meet the two-prong *Faragher/Ellerth* affirmative defense.

Fields suggests to the Court that the underlying facts of this case clearly show that strict adherence to the two-prong test established in *Faragher/Ellerth* results in substantial miscarriage of justice and opens the doors for plaintiffs who, notwithstanding *actual* knowledge of their rights and what reasonable remedies they should pursue, make a conscious decision to refuse to reasonably report harassment timely so that an employer can take prompt action.

How? Because, notwithstanding her protestations about receiving the employee manual, Dufresne admitted that she believed Fields would not tolerate sexual harassment in the workplace. She testified:

> Q Did you have the impression that that would be something, that type of activity would be something that

Mr. Fields or anybody out of the Houston office would tolerate?

A Well, it's not tolerated anywhere. It's out in the public strong now and it's not tolerated anywhere. I mean, I am aware of that from TV. *So I am sure his company was the same.* (Emphasis added).

Then, when asked why she did not report deMahy's behavior *for more than two years*, she testified:

Q What did you [and Stephanie Gammon] discuss?

A I just discussed to her, you know, about his arguing and yelling at me. That I couldn't take it. I don't understand why he keeps doing this to me, because when I decided not to say anything or do anything after the dinner, because he is a friend of mine, his family I knew prior to working there, his son was like my best friend, ***I didn't want to say anything and I didn't want to say anything to jeopardize Tom or hurt Tom***. What I wanted was to let my friend deal with his problems, okay. He made a mistake with me but let him go on, deal with his problems and I will just back off from it.

* * *

Q Were you sure . . . [that Fields would not tolerate sexual harassment] back then?

A Back then, well, like I said, ***I didn't want to do anything. I didn't want to do anything to jeopardize Tom's job***, Mike or Brian, because I had a good relationship with them, I was happy, I had a good job, a good paying job that I had. They took care of me, they were good to me. I would never admit they were not good to me. ***And so, I mean, I didn't want to do anything.*** (Emphasis added).

What is quite interesting about her testimony is that, notwithstanding whether or not she was aware of Fields' harassment policy and complaint procedure, Dufresne had *actual knowledge* that deMahy's job would be in jeopardy[11] if she reported the behavior. And, since only executives at the Houston home office had authority to fire, discipline or otherwise impact deMahy's employment, Dufresne obviously also had *actual knowledge* that the home office would be the proper venue to lodge her complaints. This *actual knowledge* is also borne out by the fact that, when she did finally correlate the rejected sexual proposition to deMahy's "yelling and screaming" and complain about deMahy's sexual innuendos, in her resignation letter,

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[11]Just as the employee manual warned.

Dufresne sent a copy of that letter not only to Jerry Fields, but also to Craig Strawbridge, the officer within Fields who was responsible for handling such complaints.

Dufresne made it clear that she did not intend to do anything about DeMahy's alleged activities – not because she was in fear of retaliation affecting her own job, but ***because she was afraid DeMahy would lose his!*** How is any employer reasonably supposed to prevent sexual harassment under these circumstances? Dufresne created a Catch-22 for Fields, in effect saying, "I get to recover damages from you because you didn't have an adequate sexual harassment complaint procedure in place, even though I wouldn't have used it anyway if you had." An employee should not capitalize by placing her employer in a such a patently unfair and untenable position.

Dufresne made a conscious decision to keep silent day after day, month after month, and year after year, for more than two years, *in order to protect the alleged harasser.* No effective sexual harassment policy, and no complaint procedure, could ever be devised by any employer under these circumstances.

II. CONSTRUCTIVE DISCHARGE IS NOT THE TYPE OF "TANGIBLE EMPLOYMENT ACTION" REQUIRED BY *FARAGHER/ELLERTH* TO IMPOSE STRICT LIABILITY ON THE EMPLOYER.

Dufresne argued in the appellate court that Fields was not entitled to the *Faragher/Ellerth* affirmative defense, since the jury found that Dufresne was constructively discharged from her job. Dufresne characterized constructive discharge as the type of

"tangible employment action" necessary to impose *strict* liability on Fields under *Faragher/Ellerth.*

There is a split among the circuits on the issue of whether an employee's constructive discharge constitutes the type of "tangible employment action" contemplated by this Court in *Faragher/Ellerth* necessary to preclude the employer's affirmative defense. The Third and Eighth Circuits[12] treat constructive discharge as "tangible employment action"; and the Second and Sixth Circuits[13] lean the other way.

The First Circuit[14] has taken a moderate approach by deciding not to establish a blanket rule, but to judge each case on its facts. Nevertheless, the First Circuit acknowledged that the "constructive discharge" label should not deprive an employer of the affirmative defense save on "rare facts." Other courts of appeal have recognized the issue, but declined to rule on it.[15] The district courts in circuits which have not yet

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[12]*Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003); *Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960 (8th Cir. 2002); *Jackson v. Arkansas Dep't. of Ed.*, 272 F.3d 1020 (8th 2001); *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160 (N.D. Iowa 2000).

[13]*Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107, 120 S. Ct. 1959, 146 L. Ed. 2d 791 (2000); *Turner v. Dowbrands, Inc.*, 2000 U.S. App., LEXIS 15733, 221 F. 3d 1336, 2000 WL 924599 (6th Cir. 6/26/00).

[14]*Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003).

[15]*Kohler v. Inter-Tel Technologies*, 244 F.3d 1167 (9th Cir. 2001); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662 (7th Cir. 2001), *cert. denied*, 534 U.S. 1041, 122 S. Ct. 617, 151 L. Ed. 2d 539 (2001).

definitively decided are also split on the issue.[16]

The leading case against including constructive discharge within the ambit of tangible employment action is *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107, 120 S. Ct. 1959, 146 L. Ed. 2d 791 (2000). In that case, the Second Circuit parsed this Court's reasoning in *Ellerth* and determined that constructive discharge could not be included, relying, in part, on this Court's language that:

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act *of the enterprise – a company act.* The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors . . . . The supervisor often must *obtain the imprimatur of the enterprise* and use its internal processes. . . .

Burlington Industries v. Ellerth, 524 U.S. 742, 763, 118

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[16] *See, Powell v. Martin*, 37 F. Supp. 2d 1011 (S.D. Ohio 1999); *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587 (D.S.C. 1999); *Demarteau v. City of Witchita, Kansas*, 64 F. Supp. 2d 1067 (D. Kan. 1999); and *Alberta v. McDonald's Corp.*, 70 F. Supp. 2d 1138 (D. Nev. 1999), which decided that constructive discharge does not constitute tangible employment action for purposes of precluding the affirmative defense. *Cf., Vasquez v. Atrium Door & Window Co. of Arizona*, 218 F. Supp. 2d 1139 (D. Ariz. 2002); *Haworth v. Romania Imported Motors, Inc.*, No. CV 00-1721, 2001 WL 34041893 (D. Oreg. 12/27/01); and *Taylor v. United Regional Health Care Systems, Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803 (N.D. Tex. 8/14/01), which have decided that it does.

S. Ct. 2257, 2269 (emphasis added).

By contrast, a recent decision from the Third Circuit, *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), held that this Court's language in *Ellerth* as cited above does not exclude constructive discharge, since, otherwise, such a view would "contravene the fundamental principle of our jurisprudence that a constructive discharge, when proved, operates as the functional equivalent of an actual termination." *Id.* at 458.

Since the label "constructive discharge" has been applied across a broad spectrum of factual situations, intervention by this Court is appropriate to resolve the split in the circuits in order to clearly establish whether "constructive discharge" does or does not rise to the level of "tangible employment action" discussed in *Faragher/Ellerth* as a matter of law; and, if it does, under what circumstances will it do so.

For example, is the constructive discharge found by the jury in the instant case – Strange's warning to Dufresne about possible lay-offs unaccompanied by any concrete action against her in Fields' name – the type of "tangible employment action" contemplated by this Court in *Ellerth*? Or, must the basis underlying the constructive discharge rise more to the level considered by the Third Circuit in *Suders v. Easton*, 325 F.3d 432 (3rd Cir. 2003), where the harassers, who were state police officers, falsely accused the employee of theft, and thereafter handcuffed, fingerprinted and interrogated her as they would an accused suspect, in order to force her resignation?

Since the vast majority of sexual harassment claims include a constructive discharge component, *i.e.*

the sexually based acts of harassment themselves were so severe as to make working intolerable, the Court's *Ellerth* affirmative defense will become meaningless, since it will not be available to employers under most circumstances. That is, while the distinction between *quid pro quo* and hostile work environment harassment which the Court attempted to dim in *Ellerth/Faragher* will no longer be a bright line, unless the Court gives guidance on this issue, there will be no line at all, and almost all supervisor harassment will result in strict liability to the employer.

III. A SUPERVISOR'S BAD TEMPER IS NOT HARASSMENT IF IT IS SIMILARLY DIRECTED TO EVERYONE.

Dufresne's complaints centered mostly around DeMahy's "yelling and screaming" at her about her work. After all, one proposition and three offhand comments with sexual innuendo over a 2-½ year period can hardly meet the "pervasive and severe" standard imposed by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Even DeMahy's body language of standing too closely to Dufresne while he dictated to her at her computer is extremely ambiguous, especially given Dufresne's own admission that the area around her desk was very cramped, and, more importantly, that when she "scooted" over, DeMahy kept his distance and *did not move closer.*

By far, the heart of Dufresne's testimony went to DeMahy's non-sexual behavior – his bad temper. In fact, when Dufresne confronted DeMahy himself about his actions a few months after the Chinese restaurant proposition, she did not complain to him about standing too closely to her; and she did not complain about his

sexual innuendos. She complained *only* about his "yelling and screaming."[17]

But, everyone, even Dufresne herself, admitted that DeMahy "yelled and screamed" at everyone – including Fields' customers. In fact, the February 9, 1999, DeMahy-bashing-fest between Dufresne and Gammon ignited because DeMahy, Strange and Gammon were arguing over the new company car Strange had received, and deMahy "went ballistic."

Dufresne herself testified that even before the Chinese restaurant proposition, DeMahy was "fussy on the phone, [would] yell on the phone." She acknowledged that DeMahy "jumped on others," and when questioned by the trial court on whether DeMahy's temper became worse with others after the Chinese restaurant proposition, she acknowledge that "yeah, he was fussing at me all day, so he got fussy with them too. . . ." She also admitted that DeMahy yelled at McHale and was "fussy" with Strange. She explained that DeMahy was a "moody person," who would go through periods of being angry in general – a bad mood one day, yet happy the next.

Yet, at no time did Dufresne ever allege, or even intimate, much less prove, that DeMahy had ever propositioned Gammon, Strange, McHale, or any of Fields' customers, or that Gammon, Strange, McHale, or any of Fields' customers had rejected any propositions.

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[17]A few months after the Chinese restaurant proposition, Dufresne placed a note on deMahy's chair that she had to speak with him. They went to lunch together, alone, at a local restaurant where they discussed only his bad temper. Dufresne admitted that deMahy neither made any sexual overtures to her, nor exhibited any sexual behavior, at their lunch.

At no time did Dufresne ever allege, or even intimate, much less prove, that DeMahy's bad temper to everyone else was in any way discrimination-based. If the irritating behavior of a supervisor, such as deMahy, is applied equally towards everyone, how can such behavior be deemed discriminatory as to Dufresne?

As this Court reiterated in *Faragher*, Title VII is not a "general civility code." Yet, the lower courts have sanctioned it to be so in this case. Once one removes all of Dufresne's complaints about DeMahy's "yelling and screaming," from the mix, all Dufresne is left with is DeMahy's *one* proposition, his *three* comments containing sexual innuendo, and his standing too closely to her during the few times he dictated to her while seated at her computer, **all over a 2-½ year period of time**. None of this meets the "pervasive and severe" standard set by this Court in *Faragher*, especially considering that, over that same 2-½ year period of time, Dufresne herself is downloading and disseminating pornographic material from the Internet, telling off-color jokes, complaining about her PMS to her male co-workers, and giving sexualized "piglet" statues to one of her male supervisors. DeMahy's sex-based conduct actually pales in comparison to Dufresne's own.

IV. DUFRESNE HERSELF WAS RESPONSIBLE FOR THE CHANGE IN HER EMPLOYMENT STATUS.

The jurisprudence is fairly consistent that, in order to make out a *prima facie* case of retaliation, a plaintiff must show that (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. *Green v. Administrators of the Tulane Educational*

Fund, 284 F.3d 642 (5th Cir. 2002).

With respect to the second prong of the plaintiff's burden, Dufresne contended that she was prompted to resign her position at Fields after Fields threatened to discharge her in retaliation for her complaints of sexual harassment. Dufresne based this contention solely on the fact that, after she returned from vacation in June, 1999, Strange warned her of potential layoffs as a result of poor performance within the company in general and in the New Orleans office in particular.

Courts have generally concluded that, to satisfy the "adverse employment action" requirement, a plaintiff must show that the employer itself made some "ultimate employment decision" that materially changed the benefits of employment, *i.e.* firing, demotion, pay cut, etc. *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000). In fact, the jurisprudence is consistent that mere *threats* of adverse action are *insufficient* to satisfy the second prong of the plaintiff's burden of proof. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997); *Hollins v. Atlantic Co.*, 188 F.3d 652 (6th Cir. 1999).

Nevertheless, the trial court and the court of appeal in this matter have now lowered the bar and have sanctioned a retaliation claim where only a "warning" about "possible" layoffs was involved. Absolutely no adverse employment action was taken by Fields against Dufresne. None of her employment conditions in any way changed. She was not fired, laid off, demoted, or disciplined, and none of the perquisites of her employment were in any way affected.

Dufresne jumped to a conclusion for which only she was responsible. She admitted that she could have

easily confirmed Strange's warnings to both McHale and her with the Houston office, but she chose not to, even though, as she testified, she "never thought" that the executives in Houston would lie to her.

Additionally, Dufresne also did not prove the third prong of her burden. The complaints she made to Strange about deMahy's bad behavior occurred in February, almost four months prior to the warning about possible layoffs. While not all of the circuit courts use a temporal time connection as the yardstick for measuring causation, a 4-month period has generally been considered too far removed. *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001), *citing, Richmond v. ONEOK, Inc.*, 120 F.3d 205 (10th Cir. 1997) (3-month delay insufficient); and *Hughes v. Derwinski*, 967 F.2d 1168 (7th Cir. 1992) (4-month delay insufficient).[18]

Even for those circuits that apply a "but for" analysis, *i.e.*, "but for" the protected activity, the adverse action would not have taken place, Dufresne also failed because Dufresne was not the only employee who was warned about potential layoffs – Strange warned McHale as well.

This Court has not yet defined what constitutes the "adverse employment action" necessary to sustain a retaliation claim under Title VII. Since the Fifth Circuit

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[18]Dufresne alleged that she did complain to McHale about deMahy's "yelling and screaming" just before she went on vacation. However, she put on no evidence to show that McHale related her complaints to either deMahy or Strange. Furthermore, complaints to someone like McHale, who was no more than Dufresne's co-worker, and who answered to the same supervisors she did, could hardly be considered "protected activity."

has now lowered the threshold by allowing a retaliation claim upon the mere warning of some adverse action, the time is ripe for this Court to intervene before the floodgates are opened further.

CONCLUSION

Fields suggests that review by this Court should be granted for the reasons more fully set out above. It has now been five years since the Court's landmark decisions in *Faragher* and *Ellerth*. Although the Court's decisions in those cases were eminently well-reasoned, they have now given rise to a loophole which allows employees, who have actual knowledge of their rights and remedies, to sit back and do nothing for an extended period of time, not, they say, because they fear for their own jobs, but because they fear for the harasser's job!

Additionally, the Court should also revisit *Faragher/Ellerth* in order to resolve the split in the circuits, and to provide more guidance on what constitutes the "tangible employment action" necessary to impose strict liability on the employer and preclude it from asserting the affirmative defense. That is, does "constructive discharge" qualify? Or, must there be some affirmative act on the part of the company itself?

In a similar vein, it is appropriate for the Court to consider, for the first time in a Title VII case, what types of actions by an employer constitute "adverse employment action" sufficient to support a retaliation claim. Is a mere "warning" of layoffs by an employer sufficient, or must the layoff actually occur? Is the employee's voluntary resignation in response to the warning sufficient? Or, again, must there be some affirmative act on the part of the company, and in the

company's name, to bring the threatened action to fruition.

Finally, Fields asks to the Court to also consider to what extent a supervisor's non-sexual bad behavior can create actionable Title VII violations where the bad behavior is directed to everyone, not just the employee who may have spurned one lone proposition.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 02-30073

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NICOLE DUFRESNE
Plaintiff – Appellee

v.

J D FIELDS & COMPANY INC
Defendant - Appellant

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before GARWOOD, JOLLY, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:
IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT
United States Circuit Judge

No. 02-30073

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NICOLE DUFRESNE,
Plaintiff-Appellee,

versus

J.D. FIELDS & COMPANY, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana USDC No.: 99-CV-3714-D
Before GARWOOD, JOLLY, and HIGGINBOTHAM, Circuit Judges. PER CURIAM:*

Nicole Dufresne brought claims of sexual harassment against her employer, J.D. Fields & Co., Inc., claiming hostile work environment and retaliation arising from her rejection of a romantic overture by her supervisor. A jury awarded Dufresne $62,500 in compensatory damages. At the close of trial, Fields moved for a judgment as a matter of law, which was denied along with Fields's motion for a new trial or remittitur. Subsequently, a bench trial was held on the issue of back pay, and the court awarded $20,330. The court also awarded $36,142.50 in attorney's fees. An additional $1,260 in attorney's fees was added after Fields unsuccessfully moved for a new trial based on new evidence. Fields timely appealed to this Court, challenging the denial of the various motions as well as the award of back pay.

After considering the record, the briefs, and the oral arguments, we are persuaded that the judgment of the district court is not in error with one exception. We find

no error in the district court's denial of the defendant's motions for judgment as a matter of law, a new trial, and remittitur, and no error in the award of back pay, and consequently we affirm the jury's findings and the court's award for back pay. However, the award of compensatory damages was in excess of the statutory cap provided in 42 U.S.C. § 1981a(B)(3)(A), which provides, under the circumstances of this case, that compensatory damages shall not exceed $50,000. Accordingly we remand for entry of judgment consistent with this statutory provision. Thus the judgment is AFFIRMED in part, REVERSED in part, and REMANDED for entry of judgment.

FOOTNOTES

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CTR. R. 47.5.4.

CIVIL ACTION
NO. 99-3714
SECTION "D" (2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

NICOLE DUFRESNE

VERSUS

J.D. FIELDS AND COMPANY, INC.

AMENDED JUDGMENT

Considering the Jury's answers to the Special Interrogatories dated January 17, 2001 (following the Jury Trial on the liability portion of this employment discrimination matter on January 15-17, 2001), the Court's denial of Defendant's (first) Motion for Judgment as a Matter of Law, New Trial or Remittitur, and further considering the Court's findings on the back pay issue (which was tried before the Court on September 12, 2001), the Court's determination of attorney's fees, the Court's denial of Defendant's (second) Motion for Judgment as a Matter of Law, New Trial or Remittitur, and the Affidavit of Plaintiff's counsel for additional attorney's fees (filed on February 4, 2002 pursuant to the court's directive), [1]

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Plaintiff, Nicole Dufresne, and against Defendant, J.D. Fields and Company, in the amount of $62,500.00, awarded by the Jury to Plaintiff in compensatory

damages, for the physical and emotional pain and mental anguish she suffered as a result of being subjected to a hostile work environment and/or retaliation, plus interest from entry date of this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Plaintiff, Nicole Dufresne, and against Defendant, J.D. Fields and Company, in the amount of $20,330.00, awarded by the Court to Plaintiff for back pay, plus prejudgment interest from August 1, 1999, [2] to January 15, 2001 (the date of the Trial on the liability issues), at the rate of 6% per annum;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Plaintiff, Nicole Dufresne, and against Defendant, J.D. Fields and Company, in the amount of $36,142.50, awarded by the Court to Plaintiff for attorney's fees incurred up to the filing of Defendant's second Motion for Judgment as a Matter of Law, New Trial or Remittitur;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Plaintiff, Nicole Dufresne, and against Defendant, J.D. Fields and company, in the amount of $1,260.00, awarded by the Court to Plaintiff for attorney's fees incurred as a result of her counsel responding to Defendants second, Motion for Judgment as a Matter of Law, New Trial or Remittitur.

New Orleans, Louisiana, this 6 day of Feb, 2001.

A.J. McNAMARA
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] In this Affidavit, Plaintiffs counsel states that attorney William McGoey spent 6.4 hours at $150 per hour working on the opposition to Defendant's second Motion for New Trial, and that attorney Derek Mercadel spent 4.1 hours at $75 per hour. The contemporaneous time report attached to this Affidavit verifies that Mr. McGoey spent 6.4 hours, but for Derek Mercadel, it indicates that he spent 4.0 hours rather than 4.1 hours. Thus, the court reduces the total amount claimed from $1,267.50 to $1,260.00. (The court previously determined that a reasonable rate for Mr. McGoey is $150/hour, and a reasonable rate for Mr. Mercadel is $75/hour. Doc. No. 83).

[2] Plaintiff was paid through July 1, 1999.

CIVIL ACTION
NO: 99-3714
SECTION: "D" (2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
McNAMARA, CHIEF JUDGE
JANUARY 23, 2002

NICOLE DUFRESNE

VERSUS

J.D. FIELDS AND COMPANY INC.

Before the court is the "Motion for New Trial, or in the Alternative, Motion for New Trial Conditioned on Remittitur" filed by Defendant, J.D. Fields & Company, Inc. Plaintiff, Nicole Dufresne, filed a memorandum in opposition. The motion, set for hearing on Wednesday, January 23, 2002, is before the court on briefs, without oral argument.

Having reviewed the memoranda of counsel and the applicable law, the court finds that the motion should be denied. In its motion, Defendant argues that a new Trial should be granted based on newly discovered evidence and fraud or misrepresentation. Specifically, Defendant states that in early March 2001, [1] it found "new evidence" that Plaintiff had filed a bankruptcy petition on January 30, 1997, and listed her address as Lake Oak Street in Metairie, Louisiana. Based on this, Defendant argues that the innocent ceiling fan visit of Plaintiff's supervisor, Tom DeMahy, to Plaintiff's

Milne Street apartment occurred after the pivotal dinner date with Mr. DeMahy, and, had the jury known this, "the jury would likely have found that the series of sexual predation events that [Plaintiff] claimed commenced with the dinner date had in fact never occurred." (Defendant's Memo. at 3-4).

However, Plaintiff's counsel counters this argument by stating:

Defendant disclosed this theory to [him] in July of 2001, several months after the trial on the merits. In response, [Plaintiff's counsel] investigated the allegation and voluntarily sent defendant copies of plaintiff's deposit and rent checks to disprove the allegation ... These checks show that plaintiff moved into the Milne apartment on or about October of 1996, three months prior to the [dinner date in question] ... Apparently, the attorney who filed plaintiff's bankruptcy petition four months after she moved to Milne mistakenly listed her former Live Oak St. address.

(Plaintiff's Memo. at 4-5).

The court concludes that Plaintiff's Trial testimony was truthful, and the court also finds that Defendant's discovery of Plaintiff's bankruptcy petition with the Live Oak Street address is not "newly discovered evidence which by due diligence could not have been discovered in time to move for new trial under, Rule 59(b)." Fed. R.Civ.Proc. 60(b). Defendant also argues that the Plaintiff's testimony during the Trial on the merits regarding the reason she resigned from her employment with Defendant is contradicted by her testimony during the back pay Trial. The court's recollection of Plaintiff's

testimony at both Trials, as reaffirmed by the court's review of the pertinent Trial transcripts, is that there was no such contradiction.

Finally, the court finds that Defendant's instant motion has caused Plaintiff's counsel to expend additional time on this matter unnecessarily. Thus, the court will award Plaintiff those attorney's fees she has incurred as a result of her counsel responding to Defendant's meritless motion. Plaintiff's counsel is instructed to file into the record, by Friday, February 1, 2002. his Affidavit setting forth his time he expended in responding to this motion. The court will then calculate the additional attorney's fees to be awarded based at the rate of $150/hour [2] and issue an Amended Judgment.

FOOTNOTES

[1] The jury Trial on the merits was conducted in January 2001, and the non jury Trial on back pay was conducted in September 2001.

[2] The court previously determined that a reasonable rate for Plaintiffs counsel, William McGoey, is $150/hour. (See Minute Entry, Doe. No. 83, entered on December 20, 2001).

CIVIL ACTION
NO. 99-3714
SECTION "D" (2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

NICOLE DUFRESNE

VERSUS

J.D. FIELDS AND COMPANY, INC.

J U D G M E N T

Considering the Jury's answers to the Special Interrogatories dated January 17, 2001 (following the Jury Trial on the liability portion of this employment discrimination matter on January 15-17, 2001), the Court's denial of Defendant's Motion for Judgment as a Matter of Law, New Trial or Remittitur, and further considering the Court's findings on the back pay issue (which was tried before the Court on September 12, 2001), and the Court's determination of attorney's fees,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Plaintiff, Nicole Dufresne, and against Defendant, J.D. Fields and Company, in the amount of $62,500.00, awarded by the Jury to Plaintiff in compensatory damages, for the physical and emotional pain and mental anguish she suffered as a result of being subjected to a hostile work environment and/or retaliation, plus interest from entry date of this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Plaintiff, Nicole Dufresne, and against Defendant, J.D. Fields and Company, in the amount of $20,330.00, awarded by the Court to Plaintiff for back pay, plus prejudgment interest from August 1, 1999, 1 to January 15, 2001 (the date of the Trial on the liability issues), at the rate of 6% per annum;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Plaintiff, Nicole Dufresne, and against Defendant, J.D. Fields and Company, in the amount of $36,142.50, awarded by the Court to Plaintiff for attorney's fees.

New Orleans, Louisiana, this 19 day of Dec, 2001.

CIVIL ACTION
NO. 99-3714
SECTION "D" (2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

NICOLE DUFRESNE

VERSUS

J.D. FIELDS AND COMPANY, INC.

Before the court is the issue of attorney's fees, which has been briefed by the parties. Having reviewed the memoranda of counsel and the applicable law, the court now rules.

The Civil Rights Act of 1964 provides that a "prevailing party" in a suit brought under Title VII is entitled to recover "reasonable" attorney's fees. 42 U.S.C. § 2000e-5(k). In this matter, Nicole Dufresne, prevailed on her claims of sexual harassment and constructive discharge, and she was awarded $62,500 in compensatory damages (by a jury) and $20,330 in back pay (by the court).

Plaintiff now seeks attorney's fees in the total amount of $65,542, which is a 10°c enhancement of the lodestar amount of $59,675 which Plaintiff has calculated based on an hourly rate of $225 for attorney William McGoey and an hourly rate of $100 for attorney Derek Mercadel. Defendant opposes the amount of attorney's fees claimed by Plaintiff, and attaches to its opposition memorandum the transcript of Mr. McGoey's

deposition which was taken to traverse the amount of attorney' fees claimed.

The lodestar approach (multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate) is the centerpiece of attorney's fees awards. In reviewing the attorneys' Interim Statement (Plaintiff's Exhibit 1), the court finds that in this litigation, Mr. McGoey reasonably expended 238 hours, [1] and his associate attorney, Derek Mercadel, reasonably expended 5.9 hours. While this was a contingency case, the attorneys' Interim Statement also reflects that Mr. McGoey's effective rate was $191.40 per hour, and Mr. Mercadel's effective rate was $100 per hour. [2] In her memorandum, Plaintiff suggests that the court increase Mr. McGoey's rate to $225 per hour.

The court may adjust the lodestar calculation by a consideration of the Johnson factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

In applying the Johnson factors here, the court first finds that this employment discrimination case

posed a level of average difficulty which Plaintiff's counsel (well-experienced in employment law) was clearly capable of handling. Further, discovery was not complicated, and Plaintiff's attorneys spent a total of 1.6 hours interviewing a handful of witnesses (other than Plaintiff herself). Further, while Plaintiff's counsel attended a few depositions in this matter, these depositions were noticed by Defendant. obviously, given the time involved to prosecute this case, Plaintiff's counsel was not precluded from other employment while handling this case. And the nature of this case was no more unique than any other sexual harassment claims, thus not making it less desirable for Plaintiff's seasoned employment law counsel.

Next, Mr. McGoey testified that in his employment law practice, the majority of his clients are contingency fee clients. (McGoey Affidavit, Plaintiff's Exhibit 3). In this matter, Plaintiff entered into a contingency arrangement whereby she agreed to pay attorney's fees in the amount of "40% of the gross settlement or gross award if won or settled after six months but before appeal ... or the amount of attorneys' fees awarded by the court, if any, whichever amount is greater." [3] (Contingency Contract of Employment, Plaintiff's Exhibit 2).

When Mr. McGoey (who has been recognized as a leading attorney in employment law) does charge clients in his employment law practice, he charges hourly rates of $140, $150, $175. and $200 depending on such factors as the ability to pay and the prospects for repeat business. [4] As a general rule, he charges $150/hour for employment cases, and the most he was ever awarded in a sex

discrimination case was $150/hour about three years ago. (McGoey Dep., pp. 70, 72, 85). He has only charged the $200/hour rate once, and that was in an ERISA case. Id.

With regard to Mr. McGoey's associate, Derek Mercadel, Plaintiff seeks attorney's fees calculated at $100/hour. Mr. McGoey testified that Mr. Mercadel graduated from law school in 1999. He was not experienced when he joined the firm, and he had not been a member of Law Review, the Order of the Coif, or Moot Court. (McGoey Dep., p. 86-87).

The court concludes that a reasonable rate for Mr. McGoey is the customary rate of $150/hour that he charges billing clients, and a reasonable rate for Mr. Mercadel is $75/hour given the level of his experience and expertise in relation to Mr. McGoey's. No enhancement of these rates is justified, because the issues involved in this case were not novel, and while the performance of Plaintiff's counsel was commendable, the quality of representation is adequately reflected in the reasonable hourly rates awarded. Abrams v. Baylor College of Medicine, 805 F.2d 528, 536-37 (5th Cir. 1986).

Accordingly, the court GRANTS Plaintiff attorneys' fees in the amount bf $35,700 (238 hours x $150/hour) for Mr. McGoey, and $442.50 (5.9 hours x $75/hour) for Mr. Mercadel, for a total amount of $36,142.50 in attorneys' fees.

FOOTNOTES

[1] While the Interim Statement reflects a total of 239 hours expended by Mr. McGoey, Mr. McGoey admitted in his deposition that the "Telephone Conference with Berins' Paralegal" entered on August 2, 2001 should lave been 0.10 hours instead of 1.1 hours.

[2] Mr. McGoey explained that in this case, he originally assigned an hourly rate of $175/hour, as this was the hourly rate for all of his contingency fee files. In December 2000, he changed the hourly rate for all of his contingency fee files to $200/hour. Such assignments of fees (as in all of his contingency fee cases) was for record keeping purposes. (McGoey Dep., pp. 78-79; and McGoey Affidavit).

[3] Mr. McGoey acknowledged that the present balance of compensatory damages, back pay and judicial interest is approximately $100,000, and if attorney's fees were paid strictly under the contingency contract, attorney's fees would amount to approximately $40,000 (40% of $100,000). (McGoey Dep., pp. 58-59).

[4] Mr. McGoey also testified that he charges as low as $85/hour for the RTA, but he has no control over this rate and this type of work is ongoing versus a one-time deal. (McGoey Dep., p. 68).

CIVIL ACTION
NO: 99-3714
SECTION: "D" (2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
McNAMARA, CHIEF JUDGE
OCTOBER 22, 2001

NICOLE DUFRESNE

VERSUS

J.D. FIELDS AND COMPANY INC.

The non-jury Trial on the issue of "back pay" was held on Tuesday, September 11, 2001, and post-trial briefing was completed on October 2, 2001. [1] Now, having considered the evidence offered at Trial, the parties' Stipulations (Doc. No. 73), the Trial and deposition excerpts offered by Defendant, and the parties post-trial briefs, and further having assessed the credibility of the witnesses, the court makes the following findings of fact and conclusions of law.

The award of back pay in Title VII cases is governed by Section 706(8) of the Civil Rights Act of 1964, 42 U.S.C. §2000e - 5(g), which provides that a court, upon finding that a respondent intentionally engaged in unlawful employment practices, may "enjoin the respondent from engaging is such unlawful practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or

hiring of employees, with or without back pay .... or any other equitable relief as the court deems appropriate." 42 U.S.C.. §2000e-5(g)(emphasis added).

The statute, however, also imposes upon the plaintiff a duty to mitigate her damages: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. §2000e-5 (g) (emphasis added).

Further, "the duty of a successful Title VII claimant to mitigate damages is not met by using reasonable diligence to obtain any employment. Rather the claimant must use reasonable diligence to obtain "substantially equivalent "employment." Sellers v. Delgado College, 902 F.2d 1189, 1193 (5th Cir. 1990). "Substantially equivalent employment" is that "employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the Title VII claimant has been discriminatorily terminated." Id.

While the successful Title VII plaintiff has the statutory duty to mitigate damages, the employer has the burden of proving failure to mitigate. Id. To meet this burden, an employer may show that substantially equivalent work was available and that the plaintiff did not exercise reasonable diligence to obtain it. However, "if an employer proves that an employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially equivalent

employment." Id.

In this case, Plaintiff seeks $34,586.93 in back pay from July 1999 (when she was constructively discharged) to January 15, 2001 (when the liability Trial on Plaintiff's discrimination claims began). In seeking this amount, Plaintiff claims she is entitled to lost earnings, lost health insurance, and lost profit sharing. The court next discusses each of these components.

I. Lost Earnings?

From September 1993 through the beginning of July 1999, Plaintiff worked at J.D. Fields and Company, Inc., as a secretary/receptionist/clerk. In 1999, she made $2200 per month for each month worked (January through July). Plaintiff was also paid bonuses, which averaged $3740 per year (for the five full years, 1994-98, that Plaintiff worked for Defendant)[2]. The court concludes that had Plaintiff remained employed at J.D. Fields for the remainder of 1999, she would have earned for the year a total of $30,140 = ($2200/month x 12 months) + $3740 bonus. [3]

(a) Lost Earnings for 1999

Plaintiff left her employment at J.D. Fields and Company, Inc. in early July 1999. She next became employed as a chiropractic assistant from October 1999 through December 1999, making approximately $9/hour, but she worked less than 40 hours a week. [4] The court finds that Plaintiff failed to reasonably mitigate her damages by not working 40/hours a week, and that Plaintiff failed to offer a credible explanation as to why she did not work

40/hours a week or why she did not become employed until October 1999, when her employment with J.D. Fields and Company, Inc. ended in early July 1999. [5] The court concludes that "with reasonable diligence" Plaintiff could have earned from August 1, 1999 through December 31, 1999, at least $7200 = 5 months x 160 hours x $9/hour. [6] Thus, for 1999, Plaintiff is entitled to back-pay in the amount of $7,540.

Calculations

$30,140 (what she would have made had she remained employed at J.D. Fields)

- $15,400 (what she earned at J.D. Fields through July 31, 1999)

- 7,200 (the least amount Plaintiff could have reasonably earned in mitigation of her damages)[7]

$ 7,540

The court rejects Defendant's argument that Plaintiff's back pay award should be reduced by the amount of unemployment compensation benefits Plaintiff would have obtained had she filed for unemployment. Plaintiff did not apply for or receive unemployment compensation benefits, so there is no double recovery. Further, even if Plaintiff had received unemployment compensation benefits, the court finds that they are a collateral source that should not be deducted from back pay. The purpose of Title VII is both to make the victim of the discrimination whole and to deter discrimination. Permitting an employer to benefit from other sources of income, like unemployment

compensation, would not serve the deterrence function of the statute.

(b) Lost Earnings for 2000

For the year 2000, Plaintiff should have earned at least $18,720 = 52 weeks x 40 hours x $9/hour. [8] Thus, for 2000, Plaintiff is entitled to back-pay in the amount of $11,630.

Calculation:

$30,140 (what she would have made had she remained employed at J.D. Fields)

- $18,720 (the least amount Plaintiff could have reasonably earned in mitigation of her damages)

$11,420

(c) Lost Earnings for January 1-15. 2001

For the year 2001, Plaintiff seeks back pay up to the date of the liability Trial, which commenced on January 15, 2001. For that month of January, Plaintiff actually earned $772.65 as a dog groomer plus unreported tips. 9 Thus, for January 1, 2001 through January 15, 2001, Plaintiff is entitled to back-pay in the amount of $300:

Calculations.

$ 1,100 1/2 of $2200 monthly salary at J.D. Fields)

- $ 800 (what Plaintiff actually earned plus a reasonable amount in tips)

$ 300

II. Lost Health Insurance?

At J. D. Fields, Plaintiff had paid health insurance. According to Plaintiff, none of the jobs she had following her employment with J.D. Fields offered health insurance benefits. However, Plaintiff offered no reasonable explanation why she did not seek employment that offered her health benefits. More importantly, Plaintiff failed to submit any proof that she purchased substitute coverage or incurred out-of-pocket medical expenses. Thus, the court concludes that Plaintiff is not entitled to an award of lost health insurance benefits absent proof of actual loss. Pearce v. Carrier Corp., 966 F. 2d 958 (5th Cir. 19-92).

III. Lost Pension Benefits?

At J.D. Fields, Plaintiff was also entitled to employer profit sharing contributions. Based on Plaintiff's calculations, she received an average of $2,734.71 per year in 401K benefits while working for J.D. Fields. [10] (See Plaintiff's Post-Trial Memo., Exhibit A).

Calculation

$15,943.39 (Exhibit 16) / 5.83 year [11] = $2734.71 per year

As part of her back pay damages, Plaintiff now seeks approximately $3,988 in lost 401K benefits: $2,734.71 from July 1999 to July 2000; and $1,253.40 from August 2000 to January 15, 2001. However, Craig Strawbridge, the Chief Financial Officer for

J.D. Fields, testified at Trial that there was no employer contribution made to the employee profit sharing plan in the year 2000. (Strawbridge Testimony, TR 60). Thus, the court concludes that had Plaintiff remained employed at J.D. Fields from July 1999 to July 2000, she would not have received any employer pension contribution, and she cannot now recoup what she was not otherwise entitled to. For the period from August 2000 to January 15, 2001, the court finds that Plaintiff is entitled to $1,070 in lost 401K benefits.

In determining this amount, the court first re-calculates the average annual employer profit sharing contribution to be $2,334.32, based upon a modification of Plaintiff's formula to include a zero contribution in the year 2000, and an addition to the number of years worked:

Calculation

($I5,943.39 + 0) / (5.83 years + 1) =$2,334 per year

Next, the court finds that this average annual contribution of $2,334 equates to $194.50 per month. Thus, for the 5 1/2 months from August 2000 to January 15, 2001, Plaintiff's lost 401K benefits would be $1,070.

Calculation

$194.50 x 5 1/2 months = $1,070

IV. Conclusion

Based on the foregoing, Plaintiff is entitled to a total of $20,330 in back-pay = $7,540 (lost earnings

for 1999) + $11,420 (lost earnings for 2000) + $300 (lost earnings for 2001) + $1,070 (lost 401K benefits).

The last remaining issue in this case is attorney's fees. Pursuant to Local Rule 54.2, the court ORDERS counsel for Plaintiff to submit to the court and opposing counsel, by November 12, 2001, a contemporaneous time report reflecting the date, time involved, and nature of the services performed. The report shall be in both narrative and statistical form and provide hours spent and justification thereof.

If Defendant contests the amount of attorney's fees so claimed, counsel for Defendant must depose counsel for Plaintiff, and submit to the court and opposing counsel, by December 12, 2001, an opposition memorandum. Thereafter, the court will rule and issue Judgment.

FOOTNOTES

[1] The jury Trial on the liability issues was held on January 15-17, 2001. The jury found in favor of Plaintiff and against Defendant on Plaintiffs claims of hostile work environment (through sexual harassment) and retaliation (by constructive discharge), and awarded Plaintiff $62,500.

[2] For the years 1994-98, Plaintiff received the following bonuses: $3,000 in 1994; $5,350 in 1995; $1,100 in 1996; $5,250 in 1997; and $4,000 in 1998. (Trial Exhibit 1).

[3] In making calculations throughout this Minute Entry, the court is mindful that: Two general premises apply in computing a back pay award:
(1) unrealistic exactitude is not required; and

(2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer.

Shipes v. Trinity Industries, 987 F.2d 311, 317 (5th Cir. 1993).

[4] Before Plaintiff worked for Defendant, she did not have a significant educational or occupational background. She did not complete high school, but she obtained a G.E.D. and also a dog-grooming diploma. Her first job as a teenager was a dog groomer. She later trained to be a chiropractor assistant and worked as such for about two years. She was then hired by Defendant as a receptionist with clerical duties.

After her employment with J.D. Field and Company, Inc., Plaintiff did not seek any type of secretarial/receptionist/clerical job in 1999. She limited her job search to chiropractic assistant jobs and dog grooming jobs.

[5] Plaintiffs resignation letter was dated July 1, 1999, and Plaintiff wrote that she would be resigning effective July 15, 1999. However, Plaintiff testified that she actually left her employment with J.D. Fields a few clays after July 1, 1999. Plaintiff admitted that she was paid through July 31, 1999.

Craig Strawbridge, the CFO for J.D. Fields, unconditionally offered Plaintiff a paid leave of absence while Defendant investigated Plaintiffs claims of sexual harassment, but Plaintiff refused this offer. The court finds that 3-4 weeks would have been a reasonable amount of time for Defendant to investigate. Since Plaintiff was paid through July 1999 (after leaving around July 1), the court gives Defendant no further credit for its offer of paid leave.

Shortly after she left her employment with J.D. Fields, Plaintiff traveled to California to visit her boyfriends and she also unsuccessfully looked for a job. She returned to Louisiana, and attended bartending classes from August 23, 1999 through September 10, 1999. While she obtained a certificate in bartending/mixology, she never pursued a job in this field.

At Trial, Plaintiff testified that initially she did not seek any clerical jobs after leaving J.D. Fields, because she was concerned about the type of reference she would receive from Defendant and she "wanted something new". (TR. 34). Given Plaintiffs testimony that her only clerical experience was leer job at J.D. Fields, the court finds that Plaintiff would have been reasonably diligent in mitigating her damages by working as a chiropractor assistant at $9.00/hour had Plaintiff worked 40 hours per week. Sellers, 902 F.2d at 1193 (reasonableness of a Title VII claimant's diligence "should be evaluated in light of the individual characteristics of the claimant and the job market").

[6] Again, "[i]nterim earnings or amounts earnable with reasonable diligence by the person ... discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. §2000e-5(g)(1)(emphasis added).

[7] From October 1999 through December 1999, Plaintiff actually earned a total of $3,721.50 while working for Cupp Chiropractic. At $9/hour, this equates to 413.5 hours ($3721.50/$9) or only 4.44 weeks (413.5 hours/40 hours).

[8] For the year 2000, Plaintiff actually earned a total of $14,667.97 ($2,875.50 as a chiropractic assistant from Cupp Chiropractic from January 2000 to March 2000; $8,335.40 as an office/clerical worker at Schubert's Marine from March 2000 to August 2000; $631.50 as a veterinarian assistant/dog groomer at Angel's Pet Grooming; and $4,289.63 as a dog groomer for Pet Central from September 2000-December 2000). Plaintiff testified that other than her job at Schubert Marine, she did not seek any type of secretarial/clerical job. Further, other than her job at Cupp Chiropractic, she did not seek any type of chiropractic assistant job.

The court concludes that in 2000, Plaintiff failed to make reasonable efforts to obtain "substantially equivalent employment" earning at least $9.00/hour for 40 hours/week.

[9] For approximately 1/2 month, the $772.65 calculates to approximately $9.66/hour ($772.65/80 hours).

[10] Plaintiff received her last profit sharing contribution on or about September 8, 1999. (See Trial Exhibit 14).

[11] In her formula contained on Exhibit A, attached to her Post-Trial Memoranda, Plaintiff erroneously entered 5.58 years. However, Plaintiff began her employment at J.D. Fields in September 1993, and ended in July 1999, thus covering 5.83 years.

CIVIL ACTION
NO: 99-3714
SECTION: "D" (2)

MINUTE ENTRY
McNAMARA, CHIEF JUDGE
MARCH 9, 2001

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

NICOLE DUFRESNE

VERSUS

J.D. FIELDS AND COMPANY INC.

Before the court is the "Post-Trial Renewed Motion fox Judgment as a Matter of Law, New Trial or Remittitur" filed by Defendant, J.D. Fields & Company, Inc. Plaintiff, Nicole Dufresne, filed a memorandum in opposition. The motion is before the court on briefs, without oral argument. [1]

In this matter, Plaintiff, a former secretary/receptionist for Defendant, sued Defendant for employment discrimination based on her sex. Plaintiff made two claims:

(1) that while working for Defendant she was unlawfully subjected to sexual harassment by a supervisory

employee, and this created a hostile work environment; and

(2) that because she made complaints about the alleged sexual harassment and hostile work environment, Defendant unlawfully retaliated against her by "constructively discharging", i.e., by threatening to lay her off and making working conditions so intolerable that she felt it was necessary to resign.

Defendant denied both of Plaintiff's claims, contending that none of its actions were unlawful. The matter was ultimately tried before a jury on January 16 and 17, 2001. At the close of the Plaintiff's case, Defendant urged its Motion for Judgment as a Matter of Law, which Defendant reurged after Defendant and Plaintiff in rebuttal rested. In both instances, the court took the motion under advisement.

The jury deliberated and found that:

(1) Defendant, acting through Plaintiff's supervisor (Tom DeMahy), knowingly subjected Plaintiff to a hostile work environment through sexual harassment, and that Plaintiff suffered damages as a legal result;

(2) Defendant failed to exercise reasonable care to prevent and promptly correct any harassing behavior and/or Plaintiff did not unreasonably fail to take advantage of any preventive or corrective opportunities provided by Defendant or to otherwise avoid the harm;

(3) Defendant retaliated against Plaintiff by "constructively discharging" her (i.e., after Plaintiff complained of sexual harassment, Defendant threatened to discharge her and made working

conditions so intolerable that she felt it was necessary to resign, and that such retaliation was a cause of Plaintiffs damage; and

(4) Plaintiff was entitled to $62,500.00 in damages for the physical and emotional pain and mental anguish she suffered as a result of the hostile work environment and/or retaliation.

(See Special Interrogatories to the Jury and Answers, attached to Doc. No. 44).

After the jury's verdict was read, the court advised the parties that Defendant's Motion for Judgment as a Matter of Law was still under advisement. The court also issued a scheduling order (keyed to the receipt of the Trial transcript) for the parties' respective post-trial memoranda addressing the motion. (Minute Entry, Doc. No. 47). [2]

On January 29, 2001, Defendant filed a "Post-Trial Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial, or in the further Alternative, Motion for New Trial Conditioned on Remittitur". (Doc. No. 46).

In its memorandum in support of its "Post-Trial Renewed Motion for Judgment as a Matter of Law, New Trial or Remittitur", Defendant bases its arguments in large part on Defendant's contention that Plaintiff's Trial testimony "lacks credibility and/or reflects that she wildly misinterpreted the words and actions of her employer and supervisors." (Defendant's Memo. at 1). Further, Defendant contends that "[t]here were other reasons, far more plausible, than [Plaintiff's] claim

of sexual harassment, that actually prompted her resignation from defendant's employ." (Id. at 9). Defendant also contends that it had an appropriate policy against sexual harassment, that Plaintiff failed to avail herself of the policy, and that Defendant took immediate and appropriate action when it learned of the sexual harassment. Finally, Defendant argues that Plaintiff's "emotional pain and suffering were attributable to other causes other than sexual harassment and were likely insignificant because she did not seek treatment from any healthcare practitioner" and Tom DeMahy's conduct "did not rise to a level of sexual harassment and the amount of damages awarded for pain and suffering was unsupported by the evidence." (Id. at 20 & 23) .

Defendant's Motion for Judgment as a Matter of Law

Under Federal Rule of Civil Procedure 50(a), a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." The Supreme Court has recently instructed that:

[I] n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

In so doing, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts

are jury functions, not those of a judge." Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 2110, 147 L.Ed.2d 105 (2000) (citations omitted). Applying this standard here, the court draws all reasonable inferences in favor of Plaintiff and concludes that the record contains sufficient evidence to support the jury's findings of hostile work environment and retaliation, and Defendant is not entitled to judgment as a matter of law. The court simply cannot substitute its judgment concerning the credibility of the witnesses (including Plaintiff), the weight of the evidence, and the drawing of legitimate inferences from the facts for the jury's.

Thus, Defendant is not entitled to Judgment as a Matter of Law.

Defendant's Motion for New Trial

Under Federal Rule of Civil procedure 59(a), "[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any reasons for which new trials have heretofore been granted in actions at law in the courts of the United States...." A new trial may be ordered when the

verdict is against the clear weight of the evidence, is the result of passion or prejudice or is clearly excessive.

While the standard for granting a new trial is less stringent than for judgment as matter of law, a new trial shall be granted only to prevent injustice or when the verdict strongly conflicts, with the great weight of evidence. In ruling on such a motion, a trial judge may weigh the evidence and consider the credibility of the witnesses. However, the court in still not free to set aside a verdict merely because it would have ruled differently, or believes that the jury should have drawn different inferences and conclusions from the evidence.

Here, Defendant differs (and indeed other reasonable persons could also differ) about the correct outcome, but the verdict rendered by this jury does not work an injustice or fall against the great weight of the evidence. Simply put, the jury believed the Plaintiff and found her more credible than Defendant's witnesses. This is in the province of the jury--particularly here, when the court (who also heard and saw the witnesses testify at Trial) finds that such a credibility assessment was not unreasonable. It is irrelevant that the evidence could also support a contrary verdict when a reasonable jury could have reached the verdict reached in this case.

Defendant also argues in part:

Nicole only actually testified to a handful of sexual harassment incidents spread out over a period of two and one-half years. The dinner date [when Tom DeMahy allegedly propositioned her for sex] and

most or all of the other incidents occurred outside of the 300 day period and therefore may not be actionable.

It is clear that the jury was confused and the defendant was prejudiced particularly as a result of the plaintiff being allowed to testify to the dinner incident that occurred 21 months prior to the commencement of the 300 day period.

(Defendant's Memo. at 23-24). [3]

However, the court specifically addressed this concern in precautionary remarks to the jury during the Trial, and again in the its instructions to the jury, the court explained:

You are now asked to determine whether Defendant, at any time after October 16, 1998 [i.e., the 300 day period], (1) sexually harassed Plaintiff thereby creating a hostile work environment; or (2) retaliated against Plaintiff by "constructively discharging" her, i.e., by threatening to lay her off and making working conditions so-intolerable that she felt it was necessary to resign, because she made complaints about the sexual harassment.

Although the parties have presented evidence concerning conduct or acts which occurred before October 16, 1998 [including the January 7, 1997 dinner date with Tom DeMahy], you are not asked to determine whether that conduct constitutes sexual harassment or retaliation, or whether any damages should be awarded for that conduct, because any claims for actions occurring before October 16, 1998 would be untimely under the law.

However, you may consider the evidence of conduct occurring before October 16, 1998 in determining whether actions occurring after October 16, 1998 amounted to sexual harassment, retaliation and constructive discharge. As triers of the fact, you may give the evidence of the pre-October 16, 1998 conduct whatever weight you believe it deserves.

(Court's Jury Instructions).

Within the 300 day period, Plaintiff testified about the Christmas gift Tom DeMahy gave her in 1998 with the comment that "if she gave him more that she would get more", and about an incident in 1999 when Mr. DeMahy put his crotch in her face. Further, Plaintiff testified that during the 300 day period, Mr. DeMahy ridiculed her and screamed at her. Thus, the court cannot conclude that the jury was confused or that Defendant was prejudiced because Plaintiff testified about the "dinner date" or any other events that occurred prior to the commencement of the 300 day period. As triers of the fact, the jury gave such evidence whatever weight the jury believed it deserved, and as instructed awarded Plaintiff damages for conduct which amounted to sexual harassment, retaliation and constructive discharge within the requisite 300 day period.

Thus, Defendant is not entitled to a new trial.

Defendant's Motion for Remittitur

The jury awarded Plaintiff $62,500.00 in compensatory damages for the physical and emotional pain and mental anguish she suffered as

a result of the hostile work environment and/or retaliation. Defendant argues that this amount is unsupported by the evidence and requests a remittitur. The court recognizes that "compensatory damages for emotional distress may only be awarded when specific evidence of actual harm is introduced," but in the Fifth Circuit, "the testimony of the plaintiff alone may be enough to satisfy this requirement." Williams v. Trader Publishing Co., 218 F. 3d 481, 486 (5th Cir. 2000) .

Here, Plaintiff's testimony (corroborated by her sister's testimony) reflects that, as a result of the hostile work environment and retaliation, she suffered emotional distress and stomach problems. Such testimony was sufficiently specific (under Fifth Circuit precedent) to support the jury's determination of damages. Compare Williams, 218, F.3d.at 486 (Title VII plaintiff's testimony that her employment discharge resulted in sleep loss, smoking and weight loss sufficient to support an award of $100,000 in compensatory damages for pain and suffering).

Thus, Defendant is not entitled to a remittitur.

Accordingly;

IT IS ORDERED that Defendant's "Post-Trial Renewed Motion for Judgment as a Matter of Law, New Trial or Remittitur" be and is hereby DENIED.

IT IS FURTHER ORDERED that a Status Conference be held in chambers with counsel of record on Wednesday, March 28, 2001 at 2:30 p.m. to discuss what issues remain for the court to decide (i.e., back pay, and attorney's fees) and how

these issues should be brought to a resolution (i.e. , by Trial or on briefs) . Judgment will not be rendered until the court rules on these outstanding issues.

FOOTNOTES

[1] The jury Trial in this matter was held on January 16-17, 2001. Post-trial briefing was completed on February 22, 2001, and Plaintiff was allowed to file a supplemental memorandum on March 8, 2001.

[2] The court did not issue a Judgment based on the jury's verdict, because Defendant's Motion for Judgment was still under advisement. Further, the issues of back pay and attorney's fees must still be tried before the court.

[3] In making this argument, Defendant incorporates by reference its Motion in Limine. (Defendant's Memo. at 24). The court denied Defendant's Motion in Limine with reasons. (Minute Entry, Doc. No. 35, pp. 3-4).

CIVIL ACTION
NO. 99-3714
SECTION "D" (2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

NICOLE DUFRESNE

VERSUS

J.D. FIELDS AND COMPANY, INC.

SPECIAL INTERROGATORIES TO THE JURY

1. Do you find from a preponderance of the evidence that Defendant, J.D. Fields and Company, Inc., acting through Plaintiff's supervisor, knowingly subjected Plaintiff, Nicole Dufresne, to a hostile work environment through sexual harassment, and that Plaintiff suffered damages as a legal result of such a hostile work environment? (See Instructions, pages 12 - 14).

YES

NOTE:
If you answered "YES" to Question 1, proceed to answer Question 2.

However, if you answered "NO" to Question 1, skip Question 2 and proceed to answer Question 3.

2. Do you find from a preponderance of the evidence that Defendant, J.D. Fields and Company, Inc., exercised reasonable care to prevent and promptly correct any harassing behavior and

Plaintiff, Nicole Dufresne, unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Defendant or to otherwise avoid harm? (See Instructions, page 14).

NO

3. Do you find from a preponderance of the evidence that Defendant, J.D. Fields and Company, Inc., retaliated against Plaintiff, Nicole Dufresne, by "constructively discharging" her (i.e., after Plaintiff complained of sexual harassment, Defendant threatened to discharge her and made working conditions so intolerable that she felt it was necessary to resign), and that such retaliation was a legal cause of damage to Plaintiff? (See Instructions, pages 15 - 16).

YES

NOTE:
Only answer Question 4:

1. if you answered Question 2 and the answer was "NO"; and/or

2. if you answered "YES" to Question 3.

Otherwise, skip Question 4, and have the Jury Foreperson sign and date this form, and return to the Courtroom.

4. What amount of damages do you find from a preponderance of the evidence will fairly and adequately compensate Plaintiff, Nicole Dufresne, for the physical and emotional pain and mental anguish she suffered as a result of Defendant's

unlawful actions (hostile work environment and/or retaliation)? (See Instructions, pages 17-18).

$62,500.00

SO SAY WE ALL

Date 1-17-01

FOREPERSON